Supreme Court of the United States

OCTOBER TERM, 1938.

No. 505.

JAMES H. MULFORD ET AL., APPELLANTS,

VS.

NAT SMITH ET AL., APPELLEES.

BRIEF OF APPELLEES, NAT SMITH ET AL. (ORIGINAL DEFENDANTS IN COURT BELOW).

OMER W. FRANKLIN,
Counsel for Nat Smith et al., Appellees.

Table of Cases

; vs. Anaconda Copper Mining Co., 167 Fed. 24 2

itham Electric Switching Device Co. vs. Tran- Development Co., 261 Fed. 792, 793 (4) 2

ate Corporation vs. Triplex Safety Glass Co., F. (2d) 352, 353 (14) 3

ral Rules of Civil Procedure, Rule 54 (d) 3

ral Surety Co. vs. A. Bentley & Sons Co., 51 (2d) 24 (8) 3

. Robertson Co. vs. Klauer Mfg. Co., 98 F. (2d) (9) 3

os vs. Iodent Chemical Co., 41 F. (2d) 637, 638) 3

vs. Trenchard et al., 146 Fed. 245, 246 (2) 2

on vs. Lloyd Mfg. Co., 257 Fed. 738 (2) 2

sylvania Co. for Insurance on Lives and anting Annuities vs. Jacksonville, T. & K. W. Co., 66 Fed. 421 (2) 2

Kannel Revolving Door Co. vs. Uhrich, 297 d. 363 (7) 3

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In this case Nat Smith *et al.*, original defendants, filed their plea and answer admitting the facts alleged in the appellants' bill, but, for want of sufficient information, did not admit or deny the conclusions of law therein contained (Rec. pp. 33 to 37).

They allege in Paragraphs 22 and 23 (Rec. p. 36) of their plea and answer that they occupy a position analogous to that of an innocent and involuntary stakeholder holding the funds claimed by the appellants and by the Secretary of Agriculture; that they come into court asking for the protection of the court and for an order directing the disposition of the funds in such manner as will protect them from adverse claims of all parties; and that they be relieved from the payment of court costs regardless of the

final outcome. They conclude their plea and answer with a prayer that they be relieved of any costs that may be incurred in the cause; that the court pass such protective orders, judgments and decrees as may protect them from any loss by reason of the imposition of the penalties; and that they be decreed by the court to be in a position analogous to a stakeholder of the funds collected by them as penalties and paid or to be paid into the registry of the court, and for general relief (Rec. p. 37).

All the pleadings in the cause undisputably show that the original defendants, Nat Smith *et al.*, have been against their will placed in the position of an innocent stakeholder. They, therefore, submit to the court that they should not be charged with any costs in the cause and that an appropriate order should be entered to protect them from any loss.

It seems well settled under the equity practice of the federal court that the taxing of costs in an equity case lies within the discretion of the court and the court can tax such costs against such parties to the cause as may seem just and proper, and, likewise, may relieve such party or parties to the cause of any costs that may be incurred.

> "In federal courts of equity the giving or withholding costs or the apportionment and division thereof is within the discretion of the court, which is to be exercised, not arbitrarily, but with reference to the general principles of equity and the special circumstances of each case."
>
> *Kell* v. *Trenchard et al.*, 146 Fed. 245, 246 (2).

Also, see to the same effect:

> *Pennsylvania Co. for Insurance on Lives and Granting Annuities* v. *Jacksonville, T. & K. W. Ry. Co.*, 66 Fed. 421 (2).
>
> *Bliss* v. *Anaconda Copper Mining Co.*, 167 Fed. 1024.
>
> *Nelson* v. *Lloyd Mfg. Co.*, 257 Fed. 738 (2).
>
> *Cheatham Electric Switching Device Co.* v. *Transit Development Co.*, 261 Fed. 792, 793 (4).

Van Kannel Revolving Door Co. v. *Uhrich*, 297 Fed. 363 (7).

Jacobs v. *Iodent Chemical Co.*, 41 F. (2d) 637, 638 (10).

Federal Surety Co. v. *A. Bentley & Sons Co.*, 51 F. (2d) 24 (8).

Duplate Corporation v. *Triplex Safety Glass Co.*, 81 F. (2d) 352, 353 (14).

H. H. Robertson Co. v. *Klauer Mfg. Co.*, 98 F. (2d) 150 (9).

The new Federal Rules of Civil Procedure do not seem to have changed this principle. Rule 54 (d), so far as relevant here, provides:

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *"

It is respectfully submitted that the circumstances of this case, as disclosed by all the pleadings therein, would seem to demand that this court should direct that the original defendants in the cause, Nat Smith *et al.*, be relieved of all costs in the case, and that appropriate orders be included in the final decree protecting them from any loss in this respect.

Respectfully submitted,

OMER W. FRANKLIN,
Counsel for Appellees, Nat Smith et al. (Original Defendants).